Uniform (or Model) Oversight of Charitable Assets Act

Reporter's Comments on Working Draft

October 6, 2009

With some modifications that suggested themselves during the drafting process, the statute follows the outline proposed at the outset of the project, and incorporates the October 2008 Drafting Committee discussion of policy choices and possible approaches. No one existing state statute served as a model or baseline for the act. However, much of the language of specific sections is adapted from language currently used in one or more states.

Section 1. Short Title

The act uses the title agreed upon by the Committee at the first meeting. Brackets indicate that the act may emerge as either a Uniform or Model Act; that choice remains to be made.

Section 2. Definition

I attempted to avoid the need for definitions, but concluded that the act would be well-served by including a few at the beginning of the act in order to streamline later sections.

The definition of "charitable asset" follows the Uniform Trust Code and UPMIFA definition, with the addition of a reference to Internal Revenue Code section 501(c)(3) in order to anchor this evolving term in the context where most of the evolution occurs.

"Charitable entity" is not a term frequently encountered in existing statutes (although it does appear in the Texas statute dealing with attorney general participation in court proceedings). Provisions that relate to the subject matter of this act may be located in parts of state codes that deal with trusts, nonprofit corporations, or attorney general functions. Some states define the term "charitable trust," whether it appears in a chapter of the state code describing attorney general duties and authority or in a chapter within the state's trust code, to include entities that are not trusts, e.g., charitable corporations. Others use the term "charitable trust" in statutes describing attorney general authority or in the state's trust code without clearly defining the term, thus creating uncertainty about the reach of the statute. The term "charitable trust" can have a meaning not limited to an entity created for charitable purposes by a trust declaration or agreement. It is sometimes said by courts and others that property held by anyone for charitable purposes is "impressed with a charitable trust" or is "held in charitable trust."

The Study Committee concluded that a major shortcoming of the 1954 Uniform Act is that it does not clearly apply to charitable entities of all legal forms and to all charitable property, no matter the owner or the form of the entity holding it. The Drafting Committee determined that the legal form of the entity holding charitable property should be irrelevant to the applicability of the act and the attorney general's authority to act to protect the assets.

In order to avoid giving an existing term a meaning in the act that conflicts with its usual meaning or relying on a term that has multiple meanings in other contexts, I chose to use the term "charitable entity" and to define it to encompass any kind of legal entity that holds or administers property for charitable purposes. Because the act should articulate the attorney general's authority to protect assets that have been solicited for charitable purposes, even if they are not ultimately "administered for" those purposes, the definition includes the words "or solicited for." Finally, the definition references Internal Revenue Code section 501(c)(3), but explicitly provides that it is not limited to organizations exempt under that provision.

No categorical exceptions are provided here because the Committee expressed its desire to make clear that the attorney general has the authority to protect charitable assets, no matter what the nature of the entity that holds them. If the Committee decides to exempt some kinds of organizations from the application of a particular section of the act, the categorical exclusions can be worked into that section. I will provide you with examples of the kinds of exemption language used by various states in the next day or two. My research leads me to conclude that, although there is some disagreement on this point, the first amendment religion clauses do not mandate exempting religious organizations from the act in general, or even a periodic reporting provision, should the Committee decide to include one. However, sensitivity to the constitutional values reflected in the first amendment, along with political and pragmatic considerations, might lead to a decision to exclude religious organizations, or at least churches from a periodic reporting requirement if one is adopted. The argument is less strong and more strongly countered, I think, when considering the general oversight and enforcement provisions and the registration requirement.

Although many existing state statutes make no attempt to specify whether they reach entities organized and/or located in other states but holding assets or conducting activities in the state (some do), this is a policy question the Committee will have to address. What is the best way to describe what out-of-state entities come under the authority of the state's attorney general? The act could leave it unsaid, thus leaving to state-by-state interpretation, if necessary, this aspect of the bounds of attorney general authority. I think it would be better, though, to come up with a policy answer to this question and a clear way to articulate that answer. I have included two possible versions of wording that express limits, based on either (1) being organized in the state, having a principal office in the state, or having substantial charitable assets in the state, or (2) doing business in or holding property in the state, which is much broader. One of the Committee's concerns was to articulate the right amount of "reach," which involves not only making sure that the attorney general of a given state can act when it is

appropriate, at the same time appropriately constraining overreaching that may lead to counterproductive "turf battles" between attorneys general of different states. Any of these three formulations appears to be consistent with jurisdictional and conflict of laws principles, and none of them opens the door to what has been criticized as attorney general meddling beyond appropriate borders. The definition also borrows language from a New York provision that makes clear that simply having a bank or investment account in the state does not bring an otherwise out-of-state entity into the definition.

The section defines "charitable fiduciary" to mean any legal entity holding property for or solicited for charitable purposes, as well as an officer, director, or trustee of a charitable entity. This definition is included because there are places in the act where it is useful to have a streamlined term to refer to non-charitable entities and individuals who are involved with charitable assets.

"Document" is defined, using the ULC standard definition, in order to use one word instead of several when the act deals with papers, reports, instruments, records, etc., and to be sure to make clear that information in electronic form is included.

Section 3. Attorney General Authority

Subsection (a) provides a broad statement of attorney general authority for purposes of the act. I chose to avoid use of the phrase "proper administration" of charitable entities, which appears in a number of existing state statutes, in order to focus, as the Committee decided to, on the protection of charitable assets and to avoid suggesting that it is the attorney general's proper role to intervene for any and all purposes in the affairs or governance of charitable entities; the Committee agreed that the attorney generals proper role is not to be a "super-board," but rather, to intervene when necessary to protect charitable assets from diversion or dissipation.

Subsection (b) reflects the Committee's desire to articulate that the statute does not replace any common law or other statutory powers the attorney general may have. Although the ULC drafting manual provides that this sort of provision is generally unnecessary, in this particular area of the law there have been instances of courts concluding that statutory provisions implicitly negated common law authority. The language of this provision also specifies that the act does not limit or restrict the rights of others provided by common law or statute. Thus, existing (or evolving) state law with respect to standing of those other than the attorney general will be undisturbed. The Committee should discuss further whether the Act should include provisions concerning standing of persons other than the attorney general or cover waiver by the attorney general of rights, etc. If so, where in the act should such provisions be placed?

Subsection (c) adopts language found in some, but not all, existing state statutes that deal with this subject. I think it might be helpful to provide explicitly that the mandates of this act are not subject to "opt out."

Subsection (d) provides in a general way for attorney general authority to seek a variety of remedies. This provision may be in the wrong place (?) or may need further elaboration here or elsewhere in the act.

Subsection (e) simply provides for attorney general rulemaking related to the act. In adopting states, this part may require elaboration or cross reference.

Section 4. Register of Charitable Entities

This part of the act establishes the initial registration desired by the Committee. It incorporates a mixture of features adapted from a number of state statutes, landing on a formulation that I believe is sufficiently detailed, but not unnecessarily burdensome on either the attorney general or charitable entities. Time limits for registration (as with time limits elsewhere in the act) are shown as several choices that reflect varying practices in states that have registration provisions. The Committee will have to decide what the time limit should be. With other Uniform Acts, I have noticed that adopting states sometimes tailor time limit provisions to their own needs and practices, in any case.

Subsections (e) and (f) are either redundant or "belt and suspenders," providing an alternate avenue for the attorney general to get information in case a charitable entity fails to register as required. Subsection (g) provides another cross-check on information that may alert the attorney general to the existence of entities subject to oversight under the act.

Note on Periodic Reporting

No section on periodic reporting is included. The Committee did not decide whether to provide for periodic reporting after initial registration. It was noted in the Committee's discussion of this subject that the act ought to avoid burdening the attorney general's office and charitable entities unless the burden is well justified by what can be gained by periodic reports.

States that provide for periodic reporting take a number of approaches. Some states provide simply that the attorney general may promulgate rules and regulations as reasonable and necessary to establish and maintain a system of periodic reporting. The advantage of this approach is that it leaves states to make their own choices about whether the game is worth the candle. The disadvantages of this approach are that it fails to provide the states that want it with good off-the-shelf language to establish this function, it invites non-uniformity that imposes

additional burden on charitable entities that operate in multiple states, and it potentially invites either ineffective or overly-burdensome information-gathering rules.

It would also be possible to prescribe particular terms for a periodic reporting requirement, which could range from minimal to elaborate. At the minimal end of the scale, the requirement could be to provide a copy of the entity's annual report and an updated inventory of charitable assets (this might not be so minimal for some organizations) or a copy of the Form 990. The disadvantage of the last option is that it is not likely to provide very timely information and is, in any case, available to anyone, including a state attorney general. The existing California, New York, and Massachusetts statutes are probably the best examples of the elaborate end of the continuum. In my opinion, provisions like the ones in these states do not belong in a uniform or model act, as they will not likely suit the needs of most other states.

Finally, the Committee may choose to omit a periodic reporting requirement altogether. A recent amendment to the District of Columbia nonprofit corporation statute chose not to include a periodic reporting scheme. An explanation of the statute provided by the D.C. Council Committee on Public Safety and the Judiciary explained that the statute reflects a deliberate choice to facilitate targeted acquisition of information by the attorney general rather than impose a requirement of regular, detailed reports that would "be burdensome to both government and the nonprofits, and is not likely to be more fruitful in curbing abuse." Because our act provides for notice to the attorney general of a wide array of life-cycle events and proceedings involving charitable entities, a periodic reporting requirement may be similarly unnecessary. If the act includes no provision for periodic reporting, it is unnecessary to struggle with exceptions to the requirement.

Section 5. Public Inspection

This section provides generally for public inspection of the register and documents filed in connection with registration. If the Committee decides to provide for periodic reporting, those reports will also be covered by this section. The language used in the general provision is typical of existing state statutes that address this subject. The exceptions have been adapted from various existing state statutes. Although some existing public inspection provisions do not articulate these exceptions, I think they make good sense.

Section 6. Investigation by the Attorney General

Some existing state statutes make a very brief and general reference to attorney general authority to investigate. Others set forth very detailed and elaborate provisions. I have chosen a middle ground, borrowing, adapting, and combining bits and pieces from a number of states.

The section attempts to articulate the range of attorney general investigative authority in a manner that is broad and inclusive, without being unbounded. The language describing the investigative authority parallels language that articulates attorney general authority in Section 3.

Some states build much more elaborate procedural mandates and protections into sections of their existing law that deal with this subject. I chose not to attempt that here, because the specifics are likely to vary from state to state and because they may be spelled out elsewhere in a state's code. This is an area that will benefit from the experience of the Committee, Advisors, and Observers. Even if the Committee agrees that the "middle ground" approach is desired, it will have to decide how to articulate the "trigger" for the investigation: should it be "when it appears to the attorney general that it is in the public interest," or "on reasonable belief" that something to which attorney general authority is pegged under Section 3 is awry or about to go awry, or something else? No matter what the trigger for the attorney general, should the authority to investigate hinge on "application to and approval of" a judge, as it does in Massachusetts? Most states that articulate attorney general investigation authority do not subject it to this filter.

Question – is the last sentence of subsection (c) redundant if subsection (e) is included as written?

Subsections (d), (e), and (f) put teeth into the investigative authority. Is it necessary or desirable to add a sentence after the first sentence of subsection (e) to specify that failure to obey a court order that ensues is contempt of court? Or does that go without saying?

Subsection (g) specifies that information generated by an attorney general investigation is generally not public information.

Section 7. Notice to Attorney General

This section incorporates a wide range of events in the life of a charitable entity that trigger an obligation to give notice to the attorney general. The items included are drawn from comments during the Committee's October 2008 meeting and a combination of adapted provisions found in several places in one or more state codes, including provisions drawn from nonprofit corporation statutes and trust statutes. Subsection (a), which requires notice to the attorney general in connection with any amendment to the entity's governing documents that changes the entity's purpose or results in a material change to the structure, governance, or activities of the entity, may be broad enough to encompass the specific situations addressed in subsections (b) through (e). Nonetheless, I chose to include those more specific situations explicitly so as to prescribe more specifically what an entity needs to provide to the attorney general in the case of a merger or dissolution of a corporate charitable entity, the termination of a charitable trust where the state code provides for otherwise unsupervised termination of a

charitable trust under a certain dollar value, and when a charitable entity of whatever legal form sells or otherwise disposes of a substantial part of its property. With respect to the latter item, two alternatives are offered for the Committee's consideration. One of them refers simply to "all or substantially all" of the property, as do a number of the states that currently have provisions of this sort. The other adapts the Ohio code language that defines the trigger with more specificity. The Committee should discuss whether certain other proposed actions by a charitable entity (for example, relocating a museum or amending a conservation easement in perpetuity that results in a diminution of the agreed upon protections) that do not involve amendment of the entity's governing documents or court proceeding as addressed in Section 8 ought to require notice to the attorney general. In the October 2008 discussion, there was some thought expressed that the attorney general ought to be notified of a plan to move charitable assets out of state, just so someone would be paying attention during the "hand-off" to another state. At the same time, it was recognized that when governing documents or gift instruments do not specify a charity's location, moving assets out of state is probably within the discretion of the governing body and is not a basis for attorney general "enforcement." If the Committee wishes to adopt a subsection requiring notice of a plan to move assets, it should be careful to specify that simply moving a bank or investment account to an out-of-state institution does not trigger the obligation.

Section 8. Proceedings Concerning Charitable Entities, Charitable Fiduciaries, or Charitable Assets.

I originally included the first subsection of this part as a subsection of the "Notice" section, but decided that it fits better with what used to be a separate section, but is now subsection (b) of this section. That part addresses attorney general participation in proceedings involving charitable entities, fiduciaries, and assets. The subsection (a) list of kinds of proceedings that require notice to the attorney general is adapted from provisions found in charitable corporation, trust, and probate sections of various state codes, and I have added a subsection to cover proceedings that involve gift instruments other than wills and trust agreements or declarations. Subsection (b) articulates attorney general authority to bring an action or intervene in a proceeding brought by someone else. The intent is to make the attorney general a proper party to a wide array of proceedings involving charitable entities, fiduciaries, or assets and to require the attorney general's sign-off on settlements and judgments resulting from such proceedings.

Section 9. Cooperation with Other Officials

This section attempts to embody the Committee's desire, expressed in the October 2008 meeting, to authorize cooperation between a state attorney general and relevant officials of other

states and the federal government. Subsection (b) provides that the most protective confidentiality rules of the cooperating governments will govern the confidentiality of shared information.